**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO. 1861 OF 2003**

Siemens Limited,
a Company incorporated under the
Companies Act, 1956, with its
Registered Office at
130, Pandurang Budhkar Marg,
Worli, Mumbai 400 018. ... Petitioner

Versus

Babulal Ramlal Walmiki,
Sanjay Gandhi Hutments No. 478,
Dighe Village,
Thane Belapur Road,
Dist. Thane. ... Respondents

WITH
WRIT PETITION NO. 2373 OF 2003

Babulal Ramlal Walmiki,
Sanjay Gandhi Hutment No. 478,
Dighe Vilalge,
Thane Belapur Road,
Dist. Thane. ... Petitioner

Versus

M/s. Siemens Limited,
Pandurang Budkar Marg,
Worli, Mumbhaui 400 025. ... Respondent

Mr. P.K. Rele, Sr. Counsel i/by Piyush Shah for
Petitioner in W.P. No.1861 of 2003 and for
Respondnet in W.P. No.2373 of 2003.

Mr. R.D. Bhat for Petitioner in W.P. No.2373 of
2003 and for Respondent in W.P. No. 1861 of 2003.

**CORAM : F.I. REBELLO,J.**
**DATED : AUGUST 24, 2005**

ORAL JUDGMENT :

1. Writ Petition No. 1861 of 2003 is by the

company impugning the award dated 21.12.2002 whereby the Seventh Labour Court at Mumbai has set aside the order of dismissal passed against the workman with effect from 15.12.1993 with a further direction to the company to reinstate the complainant with backwages to the extent of 50% and continuity of service.

. Writ Petition No. 2373 of 2003 is by the workman to impugn Part I of the Award dated 29.7.2000 whereby the learned Labour Court has recorded a finding that the findings of the enquiry officer are not perverse. It is the case of the workman that the findings are based on no evidence and in these circumstances perverse and consequently the domestic enquiry ought not to have been relied upon. The workman also challenges the main award to the extent it has denied him 50% of the backwages.

2. During the course of discussion in both these petitions, which are being disposed of by this common judgment as they are directed against the same award, company is referred to as "Employer" and workman as "Workman".

. A few facts may now be set out. The workman was employed as Sweeper with the employer at its Worli factory since 13.2.1960 and his last drawn wages were Rs.6,500/- per month. He met with an accident on 16.9.1987 and was admitted at Jaslok Hospital, Mumbai. He was discharged on 17.9.1987. On that very date, an officer of the Employer came to Jaslok Hospital and took the workman to Worli factory where the Workman was made to sit for a while and then allowed to go home by company's transport bus. No sooner the workman reached home at Kalwa, a police officer from Worli arrived and took the workman to Worli Police Station where he was informed that he has been arrested for the theft of company's property. Two other persons were also arrested in respect of the theft of the company's property. The workman was suspended on 29.9.1987 and later chargesheeted on 17.10.1987 in terms of the applicable standing orders for having committed fraud or dishonesty in connection with employer's property. A departmental enquiry was then initiated. The workman by letter dated 1.12.1987 requested the employer not to proceed with enquiry as a criminal case on the same set of facts and allegations was pending before the Magistrate and hence, irreparable harm, damage and prejudice will be caused to the workman if he is

allowed to disclose his case in the departmental enquiry. Inspite of that request, the employer proceeded with the enquiry. The Workman, therefore, approached the court which granted stay in respect of domestic enquiry. On 26.5.1989 the workman was acquitted of the offences punishable under Section 380 read with Section 114 of the Indian Penal Code by the Magistrate's Court. The stay granted thereafter came to be vacated and the enquiry was thereafter commenced from 1.7.1993 and stood concluded on 16.9.1993. On 15.12.1993 the workman was dismissed from service of the company. It is this order which was the subject matter of Reference.

3. Based on the pleadings of the parties, the learned Labour Court was pleased to frame two preliminary issues which were as under :

"1A. Whether the enquiry was fair and proper?

1B. Whether the findings of the enquiry officer are perverse?"

. On consideration of the evidence on record and for the reasons set out in the order dated 29.7.2000, the learned Labour Court held that the

enquiry held was fair and proper and further held that the findings recorded by the Enquiry Officer are not perverse.

. After the court held that the enquiry was not vitiated, and the findings are not perverse, evidence was led by the workman, that the punishment imposed was disproportionate to the misconduct alleged and proved. The Employer on its part produced memo/warnings, in so far as past record of the workman was concerned. After considering the evidence the learned Labour Court observed that the Management company has not considered the honourable acquittal of the workman. In so far as past record is concerned, the learned Labour Court held that there was no serious punishment except punishment of one day suspension by order dated 25.9.1981. The Labour Court considered the long tenure of 24 years of service by the workman with the employer and observed that the employer had not considered the length of service while imposing the punishment. The learned Labour Court also noted that the workman had got honourable acquittal in the criminal case. The contention of the employer that the workman was acquitted for want of evidence, for non examination of evidence and hostile testimony, was rejected.

The Labour Court thereafter came to the conclusion that the punishment awarded was disproportionate and accordingly set aside the punishment awarded by the Management with a direction to direct reinstatement of the workman with 50% backwages and continuity of service.

4. On behalf of the employer, it has been submitted that it was not open to the Labour Court after having held that findings were not perverse, in a case of theft to hold that the punishment of dismissal was disproportionate. It is further submitted that this was not the case of a clean acquittal and consequently it was open to the company to have proceeded with the charge. The learned Labour Court in holding that the workman was honourably acquitted has misdirected itself in law. In so far as workman is concerned, the learned counsel submits that the chargesheet was based on the criminal case filed by the employer with the police. The workman was acquitted of the charges. Once that be the case, and as the chargesheet was itself based on criminal case, once there was acquittal, the employer could not have proceeded with domestic enquiry. It is further submitted that the order of the criminal court would disclose that the acquittal is a clean

acquittal and consequently also considering that the evidence at the criminal trial and the enquiry was same, the employer was wrong in proceeding with the domestic enquiry. In so far as finding of the enquiry officer in Part I award that there was no perversity, it is submitted that the findings are based on no evidence and consequently punishment imposed cannot be sustained.

5. With the above, we shall first address ourselves to the issue as to whether this was a case of clean acquittal or acquittal on technical grounds or for want of evidence. In the Criminal case, witness examined was one Matilal Jain P.W. No. 1 from whom stolen property was recovered. P.W. No. 2 was Hussein Patel, the Investigating Officer. The Panchas for the recovery were not traceable and as such not examined. The evidence of the Security Officer was not considered as he was formal complainant and not an eye witness. The court held that P.W. 1 receiver of the stolen property had turned hostile. Pancha witnesses were not available and as such the case cannot be proved and the prosecution as such had totally failed to prove the guilt of the accused and consequently acquitted the accused. Can it be said that such an acquittal where one witness turns hostile and other

witnesses are not available can be said to be clean acquittal and or acquittal on merits. In Sulekh Chand and Salek Chand Versus Commissioner of Police and Ors. 1995 1 CLR 225 in the case of acquittal on merits and on technical grounds, this is what the Apex Court observed :

> "Therefore, once the acquittal was on merits the necessary consequence would be that the delinquent is entitled to reinstatement as if there is no blot on his service and the need for the departmental enquiry is obviated. It is settled law that though the delinquent official may get an acquittal on technical grounds, the authorities are entitled to conduct departmental enquiry on the self same allegations and take appropriate disciplinary action."

. It is thus clear that mere acquittal is not sufficient. It has to be acquittal on merits or what is sometimes known as honourable acquittal. In the instant case, can it be said that on the facts as noted earlier, that acquittal is on merits. The learned counsel for the workman has contended that in the absence of evidence before

the Criminal Court, the acquittal must be said to be on merits. It is not possible to accept the said contention. As noted earlier, the concept of acquittal on merits, would be where the prosecution has led its evidence and from the evidence, the court comes to the conclusion that there is no merit in the case of the prosecution and chooses to acquit the accused. In a case where vital witnesses are not available or witnesses turn hostile, it can never be said that the acquittal is on merits. The test of appreciation of evidence and proof are different in a criminal trial and in a departmental proceeding. The prsoeuction must prove for a conviction, proof beyond reasonable doubt. It is therefore, not possible to accept the contention as urged on behalf of the workman that the enquiry could not have been proceeded with as the workman was honourably acquitted or acquitted on merits. The first contention, must therefore, be rejected.

. It may also be pointed out before concluding the issue that on behalf of the workman, their learned counsel has relied on the judgment in the case of M. Paul Anthony (Capt.) Versus Bharat Gold Mines Ltd. and Anr. 1999 1 CLR 1032. In that case the workman was arrested pursuant to raid conducted by

the Police where mining sponge gold ball weighing 4.5 grams and 1276 grams of "gold bearing sand" were recovered. The workman was acquitted. The domestic enquiry was also held wherein some witnesses were examined. It has also come on record that the enquiry was exparte and also that the subsistence allowance had not been paid by the employer to the workman on which grievance had been made by the workman before the High Court that in the absence of payment of subsistence allowance, it was not possible for him to come from Kerala where he was residing for the enquiry. The Apex Court on the facts of that case, noted that the chargehseet was issued on the basis of the criminal complaint. The Criminal Court acquitted the workman. The Apex Court noted that the criminal case as also the departmental proceedings were based on identical set of facts. The witnesses examined in the criminal case were police officer and panch witnesses and they were also the only witnesses examined at the domestic enquiry. The court held that once the criminal court on the consideration of the evidence, came to the conclusion that no search was conducted nor there was any recovery made from the residence of the appellant, the whole case of the prosecution was thrown out and appellant acquitted and in these circumstances, the

same facts could not have been considered by the Enquiry Officer to hold the workman guilty of the misconduct alleged. The Apex Court also noted that the enquiry was exparte and further grievance of the workman therein that he had no other source of income and in the absence of payment of subsistence allowance, he could not participate in the enquiry. It is in these circumstances, that the enquiry officer held that the punishment imposed on the delinquent employee cannot be sustained. In my opinion, therefore, the case of M. Paul Anthony is clearly distinguishable on the facts set out therein.

. In the present case, the evidence of the police inspector was not rejected by the Criminal Court. At any rate, in the criminal prosecution, the Investigating Officer is only examined amongst others for the purpose of proving the fact that panchanamas and statements were recorded and further by the accused to prove omissions and or contradictions in the evidence of the witnesses from the statement recorded by the I.O. It was therefore, open to the Enquiry Officer if there was material produced in the domestic enquiry to consider the same as in the domestic enquiry, the Enquiry Officer is not bound by the rules of

evidence and or procedure contained therein. All that the Enquiry Office must consider is whether the enquiry held is fair and impartial, in terms of the standing orders and or the principles of natural justice and fair play and an opportunity was given to the workman to lead his evidence. Also whether on the evidence on record a reasonable person could have arrived at the conclusion that the charge of misconduct alleged is proved.

6. We then come to the contention as urged on behalf of the workman that there was perversity in the findings. With the assistance of the counsel for the parties, we have gone through the evidence of the I.O. H.B. Patel who was examined as M.W. No. 2 on behalf of the employer. In his evidence, what has emerged is as under :

> "I then recorded the statement of Mr.Babulal, the accused, in the presence of two panch witnesses. "

This statement was to the effect that he was involved in the offence of theft. The witness deposed that the statement was recorded in his own handwriting and he also identified his signature on the same.

. The second piece of evidence was Exh. 17 panchanama which was drawn by the Investigating Officer. Again he deposed to the fact that it was in his own hand writing and was recorded by him and he also identified his signature. The third material piece of evidence was the statement of M.W. No. 1 E.S. Dabholkar who had been shown the property recovered and he identified the same as that of the employer. In a criminal proceedings, statement made by the workman to the I.O. could not have been proved nor panchanama in the absence of panch deposing the same also could not have been proved. In other words, before the criminal court this material could not be evidence which a criminal court could consider. However, the same cannot be said in respect of the domestic enquiry. In a domestic enquiry, once the I.O. was examined and he has deposed to the said fact that would be evidence which could have been considered. Opportunity was given to the workman and he was represented by representative to cross examine the witnesses. The witnesses was not cross examined either as to the statement recorded of the workman or as to the panchanama. The workman in his evidence has merely stated that his statement was not recorded. In my opinion, once the witness had

been made available for cross examination and no suggestion was put to the witness in cross examination, that the statement was not recorded or it was under duress, merely because the workman in his evidence has made statement that his statement was not recorded would be of no consequence. The enquiry Officer has considered the evidence of M.W. No. 2. After considering the evidence of M.W. No. 2 and other witnesses, the Enquiry Officer came to the conclusion that the misconduct alleged has been proved. Once there was material on record which could be considered, it cannot be said that the findings recorded by the Enquiry Officer are based on no evidence and or inadmissible evidence. This is not the case therefore, of no evidence. Once there was material and the same material has been considered and the Enquiry Officer has come to the conclusion that the misconduct has been proved, it is not for this court in the exercise of its extra ordinary jurisdiction to re-appreciate the evidence as if it is an Appellate Authority. The contention therefore, urged on behalf of the workman that the findings are perverse and are based on no evidence will have to be rejected. The Apex Court in Nand Kishore Prasad Versus State of Bihar and Others, 1978 II LLJ 84 proceeded to decide the question of case of no evidence as under

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> "The test would be whether the impugned order rest on no evidence whatever, but merely on suspicion, conjectures and surmises."

. The Apex Court referred to the Judgement in Union of India Versus H.C. Goel, A.I.R. 1964 S.C. 364 wherein it was observed as under :

> "Suspicion cannot be allowed to take the place of proof even in domestic enquiries and that the principle that in punishing the guilty scrupulous care must be taken to see that the innocent are not punished, applies as much to regular criminal trials as to disciplinary enquiries held under the statutory rules."

. It is sought to be contended on behalf of the workman by the learned counsel that the workman had no access to the site nor was he in a position to remove the articles considering that he was under constant observation and in these circumstances, there was no conclusive evidence to show that it

was the workman who was guilty of the charge of theft. What has to be considered is the evidence on record and whether from that evidence, in a domestic enquiry, a reasonable person would come to the conclusion that the workman was guilty of the charge as levelled. That test in the present case has been satisfied. It needs no repetition to state that judicial review is not an appeal from a decision but a review of the matter in which the decision is made. The power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of this court.

. The real question therefore, is, whether on the material on record, the enquiry officer could arrive at the conclusion it arrived at and whether the action of the Labour Court discloses non-application of the principle as ennunciated by the Apex Court. We have noted the material on record which was admissible in a domestic enquiry through it may not be admissible at a criminal trial. Once the Labour Court holds that there is material, then it is not for this court to interfere with the said findings in the exercise of its extra ordinary jurisdiction unless it was

perverse or based on no material. That is not the case here. The second contention must therefore, be rejected.

7. That leaves us with the last question as to whether it was within the jurisdiction of the Labour Court to interfere with the punishment imposed. The tests for interference by the court are now well settled. Normally the court will not interfere with the managerial exercise of discretion unless the punishment imposed is said to be disproportionate to the misconduct alleged and proved. The court also has to take into consideration, whether, while considering the punishment imposed, whether the management has taken into consideration the past record and or any extenuating or attenuating circumstances. Once these tests are applied and the court comes to the conclusion that the punishment imposed is not disproportionate, then this court will not substitute the punishment imposed by its own. In that context, let us examine the case before us. The workman was charged for acts of misconduct which were theft and fraud and dishonesty in connection with employer's business or property and committing an act subversive of discipline or good behaviour on the premises of the establishment. In

the instant case, as noted earlier, the learned Labour Court in Part I award has recorded a finding that the findings are not perverse and that finding has not been interfered with. The findings are based on evidence and consequently not perverse. Once the court had come to the conclusion that the findings are not perverse and further from the record, it would be seen that past record of the workman was considered, was it open to the Labour Court to have interfered with the punishment imposed. As noted in the earlier part of the discussion, the basis on which the learned Labour Court has interfered with the order of punishment as being disproportionate are firstly on the ground that the Management has not taken into consideration the fact that the workman was honourably acquitted. As we have noted earlier, the acquittal of the workman was not honourable acquittal. The second contention on which the learned Labour Court chose to interfere was that though various letters by way of warnings etc. were issued to the workman, there was no serious punishment except one day suspension. It is on this basis that the learned Labour Court come to the conclusion that punishment was disproportionate. The learned Labour Court as pointed out earlier, has totally misdirected

itself. This was not a case of honourable acquittal but a case of acquittal on the ground of witnesses turning hostile and or witness not being available. The misconduct alleged and proved was in respect of the theft which had taken place within the premises of the company. The past record also indicated that the workman was given various warnings and was also once suspended. Once this was the record available to Labour Court, it was not open to the Labour Court to interfere with the punishment imposed by the company and substitute the same by its own.

8. Considering the above, Writ Petition No. 1861 of 2003 will have tobe allowed. Consequently, rule made absolute in terms of Prayer Clause (a). No order as to costs.

. Writ Petition No. 2373 of 2005 will have to be dismissed. Consequently, rule discharged. No order as to costs.

**(F.I. REBELLO,J.)**